No. 75024-6

OWENS, J. (dissenting) -- We granted review to determine whether the definition of "disability" adopted in *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000), for failure-to-accommodate claims should be extended to disparate treatment claims and thereby displace the definition found in WAC 162-22-020(1)-(2). Rather than answering the narrow question before us, the majority has usurped the authority of the legislature and enacted a new law, completely ignoring the recent reminder in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), that "separation of powers requires a court . . . to recognize that '"'the drafting of a statute is a legislative, not a judicial, function.'"' *Id*. at 718 (J.M. Johnson, J., dissenting) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quoting *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987))). Effective with the filing of this opinion, the more restrictive definition of "disability" applied in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, will now be the governing definition of "disability" for purposes of *all* disability-based

discrimination suits brought under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Because the majority's "judicial rewrite" of the WLAD contravenes legislative intent and ignores the precedents of this court, I dissent. *Id*. at 715 (J.M. Johnson, J., dissenting).

Before I turn to the substantive problems with the majority opinion, the process that has given rise to that opinion bears some comment. In their briefing, neither party ever mentioned, much less advocated, the adoption of the ADA definition of "disability." Likewise failing to anticipate the majority's leap, the amici in the case, the Washington Employment Lawyers Association (WELA) and the Associated General Contractors of Washington, filed briefs that made no mention of the ADA definition. The amici appropriately confined their advice to the issue before us—again, the extension of the *Pulcino* definition to disparate treatment claims. Similarly, at oral argument, neither party expressed (or was ever even asked to express) an opinion as to the appropriateness of substituting the ADA definition for the definition that the legislature, in RCW 49.60.120(3), authorized the Washington State Human Rights Commission (Commission) to promulgate. When WELA's counsel was asked whether he preferred the federal definition, he resoundingly rejected the notion, reminding the court that any redefinition of the scope of the statutory protection was "a quintessential kind of legislative function," not a judicial

function.[1] Although the genesis of this new judge-made Washington law cannot be found in the briefing or the arguments of the parties in this case, its source *is* traceable to an argument that failed to persuade a majority of this court in 2000. *See Pulcino*, 141 Wn.2d at 652-63 (Madsen, J., concurring in part/dissenting in part). But the majority's revival of the *Pulcino* dissent does not cure the gaps in the process followed here since the parties' briefing and oral argument in *Pulcino* likewise included no mention of the ADA definition of "disability."

I find significant flaws in the majority opinion. First, the majority misstates the measure of deference owed to the Commission's interpretation of the term "disability." The Commission formulated its interpretation of "disability" at the legislature's direction: in RCW 49.60.010, the legislature conferred on the Commission "powers with respect to elimination and prevention of discrimination in employment"; in RCW 49.60.110, it required the Commission to "formulate policies to effectuate the purposes of [chapter 49.60 RCW]"; and, most significantly here, in RCW 49.60.120(3), it delegated to the Commission the duty to promulgate "suitable rules and regulations to carry out the provisions of [chapter 49.60 RCW]." In light of these statutory provisions, this court stated in *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989), that "[t]he Commission's particular definition of

[1] TVW, Washington State's Public Affairs Network, Wash. State Supreme Court oral argument, *McClarty v. Totem Elec.*, No. 75024-6 (Jan. 19, 2005), *audio recording available at* http://www.tvw.org.

[disability] for unfair practice claims is entitled to be given *great weight* as it is the construction of the statute by the administrative body whose duty it is to administer its terms." (Emphasis added.) In contrast, the majority in the present case concedes only "that a court *will often give weight* to a statute's interpretation by the agency . . . charged with its administration." Majority at 16 (emphasis added). Oddly, the majority cites *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), a decision in which this court unequivocally stated that deference to the agency's interpretation is not at the reviewing court's option but is, rather, a requirement—one that can be ignored only where the regulation unmistakably conflicts with legislative intent: "A court *must give great weight* to the statute's interpretation by the agency which is charged with its administration, absent a *compelling indication* that such interpretation *conflicts with the legislative intent*." *Id*. at 111 (emphasis added).

The majority did not give the Commission's definition "great weight," or any weight, for that matter, nor did the majority show that the Commission's definition conflicts with the legislature's intent. The legislature declared, "practices of discrimination against any of its inhabitants because of . . . the presence of any sensory, mental, or physical disability . . . are a matter of state concern," since "such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state," and the legislature

expressly stated that the chapter's provisions "shall be construed *liberally*." RCW 49.60.010, .020 (emphasis added). Plainly, if the legislature had wanted the term "disability" to be narrowly, not liberally, construed in the WLAD, the legislature itself could have provided a restrictive definition in 1973, when protection against disability discrimination was first added to the WLAD. Or in 1974 the legislature could have turned to the federal Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 701, and adopted its 1974 amendment providing a definition of "disability"—the prototype for the definition incorporated in the ADA in 1990. Or in the years since 1975, the year the Commission filed the WAC sections at issue here, the legislature could have taken action to limit the scope of the Commission's interpretation of "disability." In short, the majority has ignored clear precedent by discarding the Commission's definition without identifying any "compelling indication"—or any indication at all—that the Commission's interpretation of "disability" "conflicts with the legislative intent." *Marquis*, 130 Wn.2d at 111.

Having unjustifiably ignored clear precedent by minimizing the deference owed to the Commission's interpretation, the majority goes on to base its rejection of the Commission's statutory interpretation on some shaky assertions. First, the majority argues that we should ignore the Commission's definition of "disability" because "[j]ust one year [after the Commission filed its definition], this court did not utilize" it

in *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Washington State Human Rights Commission*, 87 Wn.2d 802, 557 P.2d 307 (1976). Majority at 10. The majority's implication that the *Chicago, Milwaukee* court considered and rejected the Commission's definition is demonstrably incorrect. *Chicago, Milwaukee* arose out of Robert G. Clark's application in 1973 for a job as a railroad brakeman. As part of the application process, Clark submitted a report disclosing that he had previously had surgery on each knee to remove cartilage, the first surgery having been performed in 1962 and the second in 1967. Based on the report, the railroad's chief surgeon recommended denying Clark employment, and the railroad then rejected his application in July 1973. Clark filed a complaint with the Commission in September 1973, "charging . . . discrimination based on a possible physical handicap." *Chicago, Milwaukee*, 87 Wn.2d at 803. The Commission's chairman appointed a tribunal, and an evidentiary hearing was held in July 1974. In December 1974, the tribunal filed its decision, finding that the railroad "had discriminated against [Clark] on the basis of a physical handicap and had therefore committed an unfair practice within the meaning of RCW 49.60.180(1)." *Id*. at 804. The railroad appealed to superior court, and on July 2, 1975, the superior court entered its judgment "declar[ing] RCW 49.60 'void for lack of a definition of the term "handicapped."'" *Id*. The Commission appealed, and this court "reverse[d] the trial court's conclusion that the statute is unconstitutionally

vague." *Id*.

As is evident from the foregoing summary, the railroad's vagueness challenge, as well as the trial court's vagueness determination, predated the Commission's filing of WAC 162-22-020 and -040, the sources of the Commission's interpretation of "handicap" in RCW 49.60.180. Consequently, this court's task in *Chicago, Milwaukee* was to determine whether the superior court had correctly concluded that the railroad's procedural due process had been violated in July 1973—in other words, whether the statute was unconstitutionally vague in July 1973, when the railroad took the challenged employment action. Just as it was impossible for the trial court to consider the WAC sections (because they were not even in existence when that court made its decision), it would have been improper for this court to address the railroad's vagueness challenge (based as it was on the absence of a statutory definition in 1973) by referring to the Commission's 1975 interpretations. Thus, contrary to the majority's self-serving implication, the *Chicago, Milwaukee* court could not have taken "the opportunity" to apply the Commission's July 21, 1975, definition when the court reviewed the trial court's decision regarding the 1973 vagueness challenge. Majority at 10 n.6.

A second argument made by the majority in the present case to justify its rejection of the Commission's interpretation of "disability" is that the definition of

"disability" is "circular" because "it require[s] a factual finding that the plaintiff was discriminated against '*because of the condition* in order to determine whether the condition is a "handicap."'" Majority at 10-11 (quoting *Doe v. Boeing Co*., 121 Wn.2d 8, 15, 846 P.2d 531 (1993)). A look back at the regulations as originally promulgated shows that in 1975 the Commission's definition of "handicap" was placed within a broader statement of the essential elements of a disability-based discrimination claim. In the original "Definitions" section of chapter 162-22 WAC, the Commission included only two items:

> "Handicap" is short for the statutory term "the presence of any sensory, mental, or physical handicap", . . . except when it appears as part of the full term.
>
> An "able handicapped worker" is a person whose handicap does not prevent the proper performance of the particular job in question.

Former WAC 162-22-020 (1975). The Commission simultaneously filed WAC 162-22-040, a section entitled "General Approach to Enforcement":

> (1) For the purpose of determining whether an unfair practice under RCW 49.60.180, 49.60.190, or 49.60.200 has occurred:
>
> (a) A condition is a "sensory, mental, or physical handicap" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be <u>handicapped</u> by a sensory, mental, or physical condition if he or she is <u>discriminated against because of the condition</u> and the condition is abnormal.

> (b) "The presence of a sensory, mental, or physical handicap" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
>
> (i) is medically cognizable or diagnosable;
>
> (ii) exists as a record or history; or
>
> (iii) is perceived to exist, whether or not it exists in fact.
>
> (2) An example of subsection (1)(b)(ii) is a medical record showing that the worker had a heart attack five years ago. An example of subsection (1)(b)(iii) is rejection of a person for employment because he had a florid face and the employer thought that he had high blood pressure, but in fact he did not have high blood pressure.

Former WAC 162-22-040 (1975). As the title and first paragraph of this regulation show, the Commission was doing more than simply defining "handicap" (or "the presence of a sensory, mental, or physical handicap"). By its plain language, the regulation was intended to provide a "*general* approach to enforcement," a statement of what a plaintiff would have to show "for enforcement purposes." *Id*. (emphasis added). Former WAC 162-22-040 provided that a claim of "handicap" discrimination required proof of a "handicap" and proof of discriminatory intent arising from that condition.

In 1999, the Commission shifted former WAC 162-22-040(1)(a) into the "Definitions" section as WAC 162-22-020(2). When the Commission moved WAC 162-22-040, it eliminated the regulation's title, "General Approach to Enforcement,"

as well as the general introductory statement of paragraph (1), and it reversed the order of subsections (1)(a) and (1)(b) to produce the current version of the regulation:

> (2) "The presence of a sensory, mental, or physical disability" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
>
> (a) Is medically cognizable or diagnosable;
>
> (b) Exists as a record or history;
>
> (c) Is perceived to exist whether or not it exists in fact.
>
> A condition is a "sensory, mental, or physical disability" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question . . . . In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.

WAC 162-22-020(2) (effective Aug. 12, 1999). The Commission thus extracted from former WAC 162-22-040 the definition of "handicap" found in subsection (1)(b) of that regulation and placed it first in the new WAC 162-22-020(2) definition. The addition of subsection (1)(a) from former WAC 162-22-040 had the aim of placing the WAC 162-22-020(2) definition within the general framework of a disability-based discrimination suit—an aim carried over from (and explicit in) former WAC 162-22-040.

That the first paragraph of WAC 162-22-020(2) is the Commission's definition of "disability" is readily apparent when the definition is juxtaposed to its source. In a

1974 amendment to the Rehabilitation Act, a handicapped person was defined as

> any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619 (1974); *see Colo. Civil Rights Comm'n v. N. Wash. Fire Prot. Dist.*, 772 P.2d 70, 77 (Colo. 1989) (noting that "[t]he Federal Act clearly was intended to bring within its protection three classes of people who may suffer from discriminatory conduct: those who presently have an impairment, those who have had an impairment in the past, and those who are regarded by others as having an impairment"). The definition from the Rehabilitation Act was incorporated virtually verbatim in the ADA:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). In light of its federal counterparts, the first paragraph of WAC 162-22-020(2) is easily isolated as the Commission's definition of "disability":

> "The presence of a sensory, mental, or physical disability" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
>
> (a) Is medically cognizable or diagnosable;

(b) Exists as a record or history;

(c) Is perceived to exist whether or not it exists in fact.

In sum, the "circularity" that the majority cites as grounds for rejecting the WAC definition is simply not inherent in this definition. In any case, if the majority's problem with the definition were truly the "circularity" that the majority points to, the majority could easily remedy that problem by reading the second paragraph of WAC 162-22-020(2) for what it was in former WAC 162-22-040(1)(a) and for what it remains today, a general statement placing the definition of "disability" in the context of the elements of a disability discrimination claim.

A third argument made by the majority in this case to support its replacement of the Commission's definition of "disability" with the ADA definition is that Washington laws against disability discrimination were enacted nearly contemporaneously with the federal laws addressing the same issue. Majority at 18. Rather than supporting the majority's definition, the chronology actually undermines it. Since 1975, the legislature has known that the Commission's definition of the term "disability" was broader than the Rehabilitation Act's definition. Likewise, since 1990, the legislature has known that the Commission's definition was broader than the ADA definition. Nevertheless, even though the legislature has made various amendments to the WLAD since the Commission shifted its definition in 1999 from

former WAC 162-22-040(1)(a) into WAC 162-22-020(2), the legislature has never chosen to amend the WLAD to override the Commission's definition. The legislature has clearly acquiesced in the Commission's definition. *See*, *e.g.*, *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003) (holding that the legislature is deemed to have acquiesced in a statutory interpretation when it makes no change for a substantial period of time after the interpretation has been issued). Since statutes are to be interpreted to give effect to legislative intent, *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681, 80 P.3d 598 (2003), and an agency's interpretation is entitled to "great weight," *Marquis*, 130 Wn.2d at 111, the majority clearly errs by rejecting the entirety of the Commission's definition and replacing it with a completely new definition that the majority thinks advances a better public policy. Contrary to the majority's unsupported assertion, the chronology of enactments reveals that the legislature intended the Commission's definition to control.

Plainly enough, the true target of the majority's dissatisfaction with the definition of "disability" is not the potential disharmony between the two paragraphs in WAC 162-22-020(2); rather, it is the scope of the Commission's definition. As noted above, the legislature delegated the responsibility for defining "disability" to the Commission. How broadly or narrowly to define the term is a public policy choice—a

choice that must be left to the legislature or the body it charges with administering a statute. Since the legislature has delegated to the Commission the authority to make public policy decisions concerning the WLAD, this court must not disregard the Commission's choice and substitute its own. As shown above, in 1975 the Commission adopted paragraphs (B) and (C) of the Rehabilitation Act's definition of "handicap," but the Commission pointedly modified the Rehabilitation Act's paragraph (A). Rather than defining "handicap" as "a physical or mental impairment which substantially limits one or more of such person's major life activities," the Commission very deliberately replaced the narrower description (of an "impairment which substantially limits one or more of such person's major life activities") with the broader conception of a "condition . . . [that] [i]s medically cognizable or diagnosable." The majority, however, rewrites the Commission's definition of "disability," reversing what the Commission, in the deliberate exercise of its statutory authority, drafted and filed 30 years ago.

Before presuming to step into the role of policymaker, the majority would have benefited from a more thorough study of *Chicago, Milwaukee*, 87 Wn.2d 802. *See supra* pp. 5-7. Representing the Commission in *Chicago, Milwaukee*, Attorney General Slade Gorton introduced the case 30 years ago as one that would "produce the first appellate court construction of the 1973 statute which prohibited discrimination in

employment because of handicap." Br. of Appellant at 1 (*Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, No. 44105 (Wash. Sup. Ct. 1976)). Referring to the conclusion of the Commission's tribunal that Clark "'is and was physically handicapped within the meaning of RCW 49.60.180(1),'" *id*. at 24 (quoting Tribunal R., Conclusion No. 2 (underlining omitted)), the attorney general provided a clear overview of the statute's purpose:

> This conclusion is based upon the public policy contained in the statute. That policy . . . is to prevent (or eliminate) practices which tend to discriminate against any persons because of "the presence of any sensory, mental, or physical handicap, . . ." with respect to such persons' right to obtain and hold employment. RCW 49.60.010, supra, and 49.60.030. The law is to be liberally construed for the accomplishment of this purpose. RCW 49.60.020. *It was not intended to become a battlefield for conflicting definitions of the term "handicap." . . . [N]o matter how one defines the term "handicap" the initial issue is not whether the worker has a condition which qualifies as a "handicap" for purposes of some abstract definition, but whether the worker has any "sensory, mental or physical" condition which the employer uses as a basis for rejecting him (or her) even though that individual may be perfectly capable of properly performing the work.*

Id. at 24-25, 44-45 (emphasis added). The passage would have reminded the majority that public policy is the province of the legislature, that the public policy giving rise to RCW 49.60.180 was the prevention and elimination of discrimination in employment, that the proper focus in applying the statute is on the discriminatory intent of the employer, and that the statute's broad definition of "handicap" was intended to protect against invidious discrimination—situations where an employee has a condition that

"the *employer uses* as a basis for rejecting him (or her) even though that individual may be perfectly capable of properly performing the work." *Id*. at 25.

It is also instructive to recall that the employer railroad in *Chicago, Milwaukee* called to the court's attention the Commission's July 21, 1975, adoption of WAC 162-22-040 and asserted that the Commission's interpretation of "handicap" "opens [the] flood gates to much frivolous litigation." Br. of Resp't at 6 (*Chicago, Milwaukee*, No. 44105). Relying on this same floodgates argument, the majority in the present case rationalizes its rejection of the Commission's definition by claiming that our "scarce judicial resources" will be drained by dockets overburdened with receding-hairline and sprained-finger disability cases. Majority at 19. The majority has not explained why we should attach any weight at all to its floodgates argument, given that in the 30 years since the floodgates supposedly opened, our court system has not been bankrupted by such cases.

I also note that in *Chicago, Milwaukee*, the railroad used its floodgates argument in an effort to persuade this court to extend to all "handicap" discrimination cases the narrower definition of "handicap" that the Commission had previously adopted in WAC 162-22-030(2) exclusively for the purpose of affirmative action and reporting. Br. of Resp't at 5 (*Chicago, Milwaukee*, No. 44105). For that purpose, the Commission had defined "handicapped" persons as those "with physical, mental, or

sensory impairments that . . . [are] material rather than slight; static and permanent in that they are seldom fully corrected by medical replacement, therapy, or surgical

means."[2] While the *Chicago, Milwaukee* court did not address the railroad's invitation to supplant the broad WAC 162-22-040 interpretation of "handicap" with the narrower description in WAC 162-22-030, this court subsequently declined that invitation in *Phillips*, 111 Wn.2d 903. Acknowledging that the WLAD provisions must be liberally construed and that the Commission's definition of "disability" for WLAD claims must be given "great weight," *id*. at 908, the *Phillips* court held that the narrower definition in WAC 162-22-030 "promulgated by the Commission solely 'for affirmative action and reporting purposes'" did not apply to disability discrimination cases under the WLAD. *Id*. at 907, 908. The *Phillips* court recognized that, "[i]f the affirmative action definition of handicap is used [in lieu of the definition adopted by the Commission for use] in unfair practice cases, a large number of people will be excluded from the protection of the laws against discrimination." *Id*. at 908. The majority in the present case has overturned every principle guiding the *Phillips* court. Far from liberally construing the WLAD, showing deference to the Commission's

[2] Former WAC 162-22-030(2) (1975). In former WAC 162-22-030(1) (1975), the Commission stated that it would recognize a narrower definition of "handicap" for purposes of affirmative action and reporting, since "[t]he emphasis in law enforcement is to leave no one out," whereas "[t]he emphasis in affirmative action must be to avoid including . . . so many persons that statistics become meaningless": "None of us is a perfect sensory, mental, or physical specimen. Theoretically, every person faces the possibility of being discriminated against because of handicap—although some very remotely. It is therefore necessary to restrict the definition of handicap for purposes of affirmative action and reports on the use of handicapped workers to handicaps that are significant and permanent."

interpretation of the discrimination statutes, and rejecting the substitution of a more restrictive definition of "disability" for the Commission's definition, the majority in the present case has gone its own way and set its own policy.

For the foregoing reasons, I must dissent. First, addressing the issue before us, I would affirm the holding of the Court of Appeals that the *Pulcino* definition of "disability" is inapplicable to disability-based disparate treatment claims:

> In our view, [the *Pulcino*] test works appropriately for reasonable accommodation claims but not for disparate treatment claims. Requiring an employee to demonstrate that her disability substantially interfered with job performance in a reasonable accommodation claim is logical because without the limitation there would be no need for any accommodation. . . .
>
> But an employee claiming disparate treatment is not asking the employer to take any remedial steps on his behalf. Rather, the employee asks only that the employer not terminate him for discriminatory reasons. Logically then, under a disparate treatment theory, the employee should not have to show that his condition substantially limited his ability to perform his job because he is not requesting special treatment based on any limitation. On the contrary, the employee is asking only to be treated like all other employees.

McClarty v. Totem Elec., 119 Wn. App. 453, 469-70, 81 P.3d 901 (2003). I would necessarily disapprove the contrary decision in *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 136-37, 64 P.3d 691, *review denied*, 150 Wn.2d 1016 (2003).

Second, I would affirm the Court of Appeals decision reversing the summary dismissal of McClarty's disparate treatment claim and would remand the matter to the

trial court for further proceedings. Here, I part company with Chief Justice Alexander's view that summary dismissal was appropriate since "McClarty presented insufficient evidence to survive summary judgment." Dissent (Alexander, C.J.) at 3. The record below plainly shows that Totem Electric's motion for summary judgment on the disability discrimination claim was based exclusively on McClarty's alleged failure to prove the first element of his prima facie case—the existence of a "disability." Totem Electric argued that the *Pulcino* definition of "disability" applied and that, based on McClarty's deposition testimony that he could do "anything" the job required, CP at 96, McClarty could not satisfy the second prong of the *Pulcino* definition—proof that his carpal tunnel syndrome "had a substantially limiting effect upon [his] ability to perform his . . . job." 141 Wn.2d at 641; *see* CP at 110 (Totem Electric's Mem. in Supp. of Summ. J.); CP at 59-61, 63 (Def.'s Reply to Pl.'s Mem. in Opp'n to, and Mot. to Strike Def.'s Mot. for Summ. J.). McClarty met this challenge by correcting Totem Electric's misapplication of the *Pulcino* definition and by accurately asserting that the governing definition was the one promulgated by the Commission in WAC 162-22-020(2). McClarty then more than adequately supported the first element of his prima facie case by submitting two items satisfying the WAC definition of "disability," as it had been interpreted in our prior case law: he attached his physician's report, which established the diagnosis of "bilateral carpal tunnel," and

his sworn declaration stating that Totem Electric's "agent and employee, Rick Sare, [informed him] that [his] having carpal tunnel was the basis for defendant's firing me within 5 hours of their receiving the doctor's diagnosis." CP at 56, 54-55. Totem Electric never disputed the carpal tunnel diagnosis, nor did it contest for purposes of its summary judgment motion McClarty's "allegation that Rick Sare told [him] that Totem's basis for discharging [him] was his diagnosis of carpal tunnel syndrome." CP at 60 n.4 (Def.'s Reply to Pl.'s Mem. in Opp'n to, and Mot. to Strike Def.'s Mot. for Summ. J.). Because we review de novo the summary judgment motion actually filed by Totem Electric, and not some hypothetical motion based on factual allegations or legal arguments to which McClarty was given no opportunity to respond,[3] we must

[3] I recognize that "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). However, on appeal, Totem Electric never broadened its argument to claim that summary judgment was warranted on any ground other than McClarty's alleged failure to satisfy the second prong of the *Pulcino* definition; moreover, the record before the trial court was limited to that narrow argument. We simply cannot presume to weigh the evidence regarding the additional elements of McClarty's prima facie case—that he "was doing satisfactory work" and "was replaced by a . . . person [outside the protected group]"—nor should we attempt to assess how the parties would have met their shifting burdens of proof regarding Totem Electric's potential assertion of a nondiscriminatory reason for McClarty's termination. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362, 363,753 P.2d 517 (1988); *Chen v. State*, 86 Wn. App. 183, 189, 937 P.2d 612 (1997). In fact, it was only in a footnote in its reply brief on the summary judgment motion that Totem Electric introduced three negative work evaluations, two of which were dated after McClarty's termination. The evaluations had no bearing on Totem Electric's *Pulcino*-based argument, and in any case, they remain untested evidence, having been belatedly and obliquely introduced in a rebuttal brief. CP at 60 n.4 (Def.'s Reply to Pl.'s Mem. in Opp'n to, and Mot. to Strike Def.'s Mot. for Summ. J.).

conclude that Totem Electric was not entitled to summary judgment on its narrow, legally flawed theory that McClarty had failed to satisfy the second prong of the inapplicable *Pulcino* definition.

As a final matter, I would acknowledge McClarty's concession that an award of attorney fees under the WLAD must abide the trial court's final determination of the prevailing party on the merits, and contrary to the majority's approach, I would leave to the commissioner or clerk any award of costs on appeal. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 153, 94 P.3d 930 (2004) (citing *McClarty*, 119 Wn. App. at 472-73); RAP 14.6.

AUTHOR:
Justice Susan Owens

WE CONCUR:

Justice Tom Chambers

Justice Mary E. Fairhurst